

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.814 OF 2004

IN

SUIT NO.766 OF 2004

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Shri Vishwanath Keshav Vichare ...Plaintiff

v/s.

Shri Sanjay Santu Jadhav ...Defendant

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Mr.S.M.Suryawanshi for the Plaintiff.

Mr.Sandeep Padwal for the Defendant.

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CORAM: D.K.DESHMUKH, J.

DATED: 6TH DECEMBER, 2004

P.C.:

1. This Notice of Motion is taken out by the

Plaintiff. The Plaintiff has filed this suit under Section 6 of the Specific Relief Act. The suit relates to the possession of room No.23, situated at Tukaram Chawl, Saibaba Nagar, Bandra (East), Mumbai-400 051. Admittedly the Defendant is the owner of the premises. According to averments in paragraph 1 of the plaint, the Plaintiff was in possession of the suit room as a lessee pursuant to the agreement dated 1-4-2003 and was paying rent at the rate of Rs.1000/- per month. As per the averments in paragraph 3, the Plaintiff had in the year 2003 given a friendly loan of Rs.2 lakh to the Defendant and the Defendant mortgaged the suit premises in favour of the Plaintiff. It appears that the Plaintiff had issued a notice to the Defendant dated 19-9-2003, where the Plaintiff says that pursuant to the mortgage deed which was executed on 1st April, 2003, the same day on which the alleged lease deed was executed, the Plaintiff was placed in possession as a mortgagee. The Plaintiff relies on undated lease agreement which is on the stamp paper of 30th March 2003, the agreement of lease dated 1st April, 2003, rent receipts of January, 2003, March, 2003, June, 2002 and August, 2002 as also October, 2003. According to the Plaintiff, lease was granted to him for 5 years.

But he was forcibly dispossessed in February, 2004.

2. The defence of the Defendant is that the Plaintiff was never in possession of the premises exclusively. Because the Defendant had taken a loan of Rs.2 lakh from the Plaintiff, he was allowed by the Defendant to conduct his business of autoparts repairs in the suit premises till the repayment of the loan. The loan has been repaid. In support of his case, the Defendant relies on the documents issued by the local authorities granting him licence under the Shop and Establishment Act in June, 2002 and other documents by which he applied for being granted to commence a factory in the suit premises. So far as documents are concerned, the case of the Defendant that he is an illiterate person and because he needed loan for his business and the Plaintiff offered him loan, the Plaintiff forced him to sign various documents.

3. I have heard the learned Counsel for both sides. In my opinion, the Plaintiff come to the court with absolutely false case. The Plaintiff has himself produced a notice dated 19-9-2003. In that notice the Plaintiff states that he advanced a loan of Rs.2

lakh to the Defendant. The Defendant executed a promissory note in his favour. The Defendant also mortgaged the suit property in favour of the Plaintiff and also executed a lease-deed, which are both dated 1st April, 2003. It is further stated in the notice that the money was given by the Plaintiff to the Defendant on 15th April, 2002 for a period of one year. But the repayment was not made and therefore on 1st April, 2003 a lease deed and mortgage deed were executed. It is significant that in this notice, the Plaintiff does not even claim that he is carrying on business in the suit premises, though he claims that he was placed in possession thereof. In this notice, the Plaintiff claims that he got possession of the property in April, 2003. However, he has come to the court with an agreement, which is undated, but is on the stamp paper of dated 30th March, 2002. The learned Counsel appearing for the Plaintiff also stated before me that this agreement was executed before 1st April, 2003. It appears from recitals of this agreement that the lease in the year 2002 itself was for a period of five years. But this agreement is not mentioned in the notice dated 19-9-2003. There is no explanation to be found on record for this omission. Though in

the notice, it is stated that the tenancy commenced in April, 2003, the Plaintiff has produced rent receipts for a period even before April, 2003, right from the month June, 2002. Though the lease agreement says that monthly rent of Rs.1,000/-, in the notice dated 19-9-2003 there is no claim made that the Plaintiff is paying any rent to the Defendant. What is pertinent to note here is that though according to the Plaintiff he was carrying on business from 2002 in the premises, why the Shop and Establishment agreement has been granted in favour of the Defendant. There is no explanation to be found for this anywhere on record. It is clear from the documents filed with the reply by that the Defendant that he had applied for Factory Licence in the month of June, 2003. It, thus, appears from the documents produced on record and the contrary conduct of the Plaintiff that it was essentially a loan transaction between the Plaintiff and the Defendant. The Plaintiff was never placed in possession either as a lessee or as a mortgagee. It was the Defendant's business, which might have been permitted by the Defendant to be carried on by the Plaintiff till repayment of loan. What is further significant is that though in the reply, the Defendant categorically

states that he has refunded the loan, there is no categorical statement to be found in the rejoinder filed by the Plaintiff that the amount of loan was not repaid. In the rejoinder defence is that the transaction of loan and suit transaction are different. This stand is contrary to what is stated in the notice dated 19-9-2003. It is categorically stated that because the loan was not repaid within one year on 1st April, 2003 a mortgage deed and a lease-deed were executed. In my opinion, no reliance can be placed on what the Plaintiff says and therefore, it cannot be said that the Plaintiff has a prima facie case in his favour. In the absence of any prima facie case in favour of the Plaintiff, no interim order can be made in his favour.

Notice of Motion is disposed of.

Ad-interim order earlier made is vacated.

At the request of the learned Counsel appearing for the Plaintiff, it is directed that the ad-interim order shall continue to operate for a period of four weeks from today.

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